SUPREME COURT, U. S.
NOV 21 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

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NO. 73-287

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ADELE BORSERINE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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# BRIEF OF RESPONDENT IN OPPOSITION

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## OPINION BELOW

The decisions below are reported as: Borserine v. State, 273 So.2d 802 (3d D. C.A.), cert. denied, 278 So.2d 285 (Fla. 1973), and are printed in the Appendix to the Petition for Writ of Certiorari at A-1 and A-10, respectively.

## JURISDICTION

The jurisdictional requisites are set forth in the petition.

## QUESTION PRESENTED

Respondent respectfully rephrases the petitioner's "Question Presented" as follows:

> WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE DECISION BELOW, WHICH AFFIRMED PETITIONER'S CONVICTIONS PER CURIAM, WITHOUT A WRITTEN OPINION, AND PETITIONER ALLEGES THAT THE COURT BELOW DID NOT APPLY THE RULING OF THIS HONORABLE COURT IN MIRANDA V. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)?

## STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as set out by petitioner, with the following additions and/or corrections:

(a) When Detective Walker was asked if there had been any explanation by petitioner regarding her possession of goods which had been stolen less than four hours previously, the trial judge overruled counsel's objections thereto, relying upon State v. Young, 217 So.2d 567 (Fla. 1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969).

(b) At page 4 of the petition, petitioner's assertions in section (b) should be amended to include the fact that it was petitioner's counsel who announced to the jury:

> MR. RAGANO: Ladies and gentlemen of the jury, it has been stipulated between counsel for the State and myself that if we were to recall Detective Ralph Walker, who testified previously, as a witness, and made the arrest of the defendant that he would testify that at the time he arrested her he advised her as follows:

The "Miranda rights" and petitioner's response thereto, as set forth in section (b) of the petition, were read to the jury by Mr. Ragano.

Additionally, Agent William Kelly, of the Federal Bureau of Investigation,

testified that he observed from across the street when Detective Walker arrested petitioner. Sometime later, petitioner was sitting in the back seat of an official car and Agent Kelly was sitting in the front seat. The following testimony was given:

> Q: (BY MR. DUBITSKY) Who initiated the conversation?
>
> A: (BY AGENT KELLY) She did.
>
> Q: And how did she initiate the conversation?
>
> A: She asked me who I was.
>
> Q: Did you reply?
>
> A: I identified myself and showed her my credentials.
>
> Q: What, if anything, did she reply?
>
> . . .
>
> [Mr. Ragano objected on the basis that Agent Kelly had not advised petitioner of her constitutional rights. The trial court overruled the objection on the basis that petitioner's statements were volunteered and not the product of interrogation.]
>
> (R. 133). . .
>
> Q. (BY MR. DUBITISKY) What, if anything, did she say to

you after you identified yourself, Mr. Kelly?

A: She asked me how did we find out about her.

Q: And did you reply to her at that time?

A: I said we had known about her for quite some time from a number of sources.

Q: Did she reply anything to you at that time?

A: After I made a few other statements to her she did after I told her some of the things that I knew about her interstate activities.

Q: What did she say to you?

A: I can almost quote it word for word.

Q: What did she say?

A: Can't we work something out?

## ARGUMENT

Rule 19(1) of the Supreme Court Rules states that certiorari will be granted only "where there are special and impor-

tant reasons therefor." Even though the question presented by the petitioner is a federal question, it is not of such substance as to warrant review by this Honorable Court.

In discussing what is meant by a substantial federal question, this Honorable Court stated in Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897, 901 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L.ed. 922, 924, 43 S.Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes

> evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 80 L.ed. 688, 707, 56 S.Ct. 466.

It is obvious that the instant case presents merely an episode or academic reason for review. This Court's limited reviewing power should not be utilized to supervise the adherence to its previous rulings on a factual, case-by-case basis.

Petitioner alleges that the Court below did not apply the ruling of this Honorable Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, it is obvious that she was properly advised of her "Miranda rights." She indicated a willingness to talk, and made exculpatory statements to the effect that she didn't understand why she was being arrested. Yet, she later volunteered incriminating statements to Agent Kelly.

In addtion, petitioner has attempted to draw into the instant question the charge given to the jury by the trial judge. This charge was to the effect that unexplained possession of recently stolen property was an inference of fact that the jury could consider along with other facts and circumstances. In her appeal to the court below, petitioner admitted that such charge had been approved by the Florida Courts in State v. Young, supra. In that case, the provisions of Miranda v. Arizona, supra, were

reconciled with the common law inference.

This Honorable Court just recently reviewed the law concerning such common law inferences and the standards by which their validity was to be determined in conformity with due process requirements. Barnes v. United States, ___ U.S. ___, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). Respondent submits that Florida law, as outlined in State v. Young, supra, is entirely in harmony with the standards enunciated therein. There is no reason for this Court to examine the issue further.

In view of the totality of the circumstances in the instant case, it is clear that the issues presented are of a factual nature, important only to petitioner and respondent, and do not warrant review by the Supreme Court of the United States.

## CONCLUSION

Even though a federal question has been presented, it is unsubstantial, and therefore, this Court should deny jurisdiction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition was served upon FRANK RAGANO, Esquire, Roberts Building, 28 W. Flagler Street, Miami, Florida, 33130, this ___ day of November, 1973.

LINDA C. HERTZ
Assistant Attorney General